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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-105

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Appellants,

v.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

MOTION TO DISMISS APPEAL

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Court-appointed attorney for
Appellee Maurice John Keenan

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MOTION TO DISMISS APPEAL

Appellee, Maurice John Keenan, hereby moves that the appeal herein taken be dismissed on the grounds that (1) the cause has been rendered moot; (2) the appeal does not present a substantial federal question; and (3) the decision below was based on an adequate and independent state ground.

STATEMENT OF THE CASE

Apart from their continued use of the word "secret", with its necessary implication of impropriety, appellants have accurately summarized the procedural history of this case in their Jurisdictional Statement. Since the issuance of the opinion below and the filing of the Jurisdictional Statement, however, the following events have occurred that are relevant to this Court's consideration of the instant motion.

On July 29, 1982, proceedings were held in San Francisco Superior Court pursuant to the Peremptory Writ of Mandate issued

by the California Supreme Court. At those proceedings second counsel was appointed to represent Mr. Keenan. Prior to making the appointment, in open court and with the prosecution raising no objection, the court stated that it was doing so as an independent exercise of its discretion as well as in response to the mandate of the California Supreme Court. While the hearing concerning the request for the appointment of second counsel was briefly held ex parte and in chambers, it was immediately followed by the filing of a written general appearance in open court by the lawyer who had been designated as second counsel. On the same day that second counsel was appointed, a trial date of November 1, 1982 was set with the concurrence of the prosecution.

ARGUMENT

I.

BY NOT OBJECTING TO THE APPOINTMENT OF SECOND COUNSEL AND THE SETTING OF A TRIAL DATE, AND BY FAILING TO REQUEST FROM THIS COURT A STAY OF ALL PROCEEDINGS IN THE UNDERLYING CASE, APPELLANTS HAVE ALLOWED THE ISSUES RAISED IN THE JURISDICTIONAL STATEMENT TO BECOME MOOT.

Simply stated, this case concerns a dispute between Mr. Keenan and the appellants over whether or not a second lawyer should be appointed to defend Mr. Keenan. That dispute has now been fully resolved, and, despite his belief in its correctness, Mr. Keenan has no interest in defending the decision of the California Supreme Court in this Court. The appellants, by objecting to further proceedings in the trial court or asking this Court for a stay of proceedings, had avenues open to them through which they could have attempted to keep the controversy alive in order that it be resolved by this Court. This they did not do. Consequently, there is no controversy between the parties of sufficient immediacy and reality to justify review by this Court.

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II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants' incorrect and tortured reading of the opinion below apparently leads them to conclude that the California Supreme Court has sanctioned the "secret" appointment of counsel to represent criminal defendants in violation of the federal constitutional rights of the People of the State of California. Nowhere in its opinion, however, does the California Supreme Court suggest that the actual appointment of second counsel be done other than in open court.

Appellants purport to acknowledge that the holding of an in camera hearing on a motion for second counsel, as allowed by the opinion below, would not offend their notion of federal constitutional principles as long as the ruling on the motion is then made in public session. (See Jurisdictional Statement at page 18.) Subsequently in their Jurisdictional Statement, however, they claim that such a procedure offends due process (see Jurisdictional Statement at page 29.) Whatever appellant's precise position is, it is clear that in allowing a criminal defendant to move ex parte for the appointment of a second lawyer, the California Supreme Court has not touched upon a substantial federal question warranting the attention of this Court. The principle that an indigent criminal defendant must be allowed to make a showing ex parte as to the need for funds to hire experts, investigators, and others to assist him in his defense in order to avoid being forced to compromise his Fifth Amendment rights is well settled. See, e.g., 18 U.S.C. §3006A(e); Marshall v. United States 423 F.2d 1315 (10th Cir. 1970). In Marshall, for example, a judgment of conviction was reversed because the trial court had erroneously required the defendant to testify and subject himself to cross-examination concerning the basis for his request that

the court appoint an investigator to investigate certain elements of his contemplated defense.

III.

THE OPINION BELOW RESTS ON ADEQUATE AND INDEPENDENT NON-FEDERAL GROUNDS.

As discussed above, it is the position of Mr. Keenan that this appeal does not present a substantial federal question. However, even if such a question was presented, it is absolutely clear that the opinion below rests on adequate and independent non-federal grounds. The portion of the opinion below with which appellants find fault reads as follows:

> To avoid undue disclosure of defense strategy, defendant is entitled to the application, by analogy, of section 987.9's provisions for confidentiality to the making and hearing of the motion for such appointment. (See Puett v. Superior Court (1979) 96 Cal.App.3d 936, 940, fn. 2 [158 Cal.Rptr. 266]; People v. Faxel, supra, 91 Cal.App.3d 327, 330, fn. 1.) (31 Cal.3d at 430.)

The footnote in Faxel to which the court makes reference, refers, in turn, to Allen v. Superior Court 18 Cal.3d 520 (1976), the leading California Supreme Court case on the constitutional propriety of prosecutorial discovery. And Allen, in which the California Supreme Court reversed a trial court's order requiring a criminal defendant to reveal to the prosecution the names and addresses of witnesses he intended to call, was based explicitly on the privilege against self-incrimination set forth in Article I, Section 15 of the California Constitution. Thus, even if the issue raised by the appellants was subject to any question under federal law, which it is not, the fact that the opinion below is based on a provision of the California Constitution would be reason enough for this Court to decline review.

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CONCLUSION

The grounds for this appeal are fictitious and frivolous. Moreover, in pursuing the dual course of forcing Mr. Keenan to defend against this unwarranted appeal while at the same time literally fighting for his life in the trial court, appellants are engaging in a form of harassment which should not be countenanced by this Court. Consequently, this appeal should be dismissed for lack of jurisdictional requirements.

IT IS SO MOVED.

Respectfully submitted,

M. GERALD SCHWARTZBACH
Court-appointed attorney for
Appellee Maurice John Keenan

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellee, Maurice John Keenan, who is now held by the California Department of Corrections in San Quentin, California, asks leave to file the attached Motion to Dismiss Appeal without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The appellee's affidavit in support of this motion is attached hereto.

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AFFIDAVIT

I, Maurice John Keenan, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the appellee in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I do not believe that the appellants are entitled to the relief they seek in this case.

4. The nature of this case is briefly stated as follows: I petitioned the California Supreme Court for relief from denial of my pre-trial motion for a second attorney to be appointed to defend me in my pending death penalty case. The California Supreme Court granted the relief I requested, and ordered that a second attorney be appointed. The State of

California has appealed this ruling claiming that the action of the California Supreme Court has violated federal constitutional principles.

Maurice J. Keenan
MAURICE JOHN KEENAN

Duly witnessed and sworn to before me, a notary public, this 20th day of September, 1982.



Notary Public